

ANNULMENT OF FRAMEWORK DECISION

2005/667/JHA

The EC's Scope of Action in Preventing Ship-Source Pollution by
the Introduction of Penalties



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1 Introduction: European Measures Promoting Maritime Safety

Ship-source pollution is one of the major challenges of today's shipping community. Both accidental spills and illegal voluntary discharge of polluting substances into the seas lead to considerable damage of the marine environment. Following the major accidental oil-spills of 1999 and 2002 in the "ERIKA" and "PRESTIGE" accidents off the French and Spanish coastlines, the European Union adopted a series of legislative measures to improve safety at sea. These were outlined in the so-called Erika 1, Erika 2 and Erika 3 packages, which contained inter alia a ban on single-hull oil tankers transporting heavy-fuel oil in European ports, the establishment of the European Maritime Safety Agency and a strengthening of the legislation relating to the inspection of ships by port states and classification societies.

In the course of this process, also a sanctions regime for ship-source pollution offences was developed, and on 12 July 2005 the European Parliament and the EU Council adopted Directive 2005/35/EC¹ "on ship-source pollution and on the introduction of sanctions, including criminal sanctions for polluting offences", based on Article 80(2) EC Treaty. To supplement the Directive, Framework Decision 2005/667/JHA² "to strengthen the criminal law framework for the enforcement of the law against ship-source pollution" was adopted in September 2005 on the basis of Title VI of the Treaty on European Union.

According to Article 1 of the said Directive, its purpose is "to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges are subject to adequate penalties." It establishes that Member

¹ OJ 2005 L 255, Page 11.

² OJ 2005 L 255, Page 164.

States have to regard ship-source pollution committed with intent or serious negligence as infringements, which have to “be subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.”

The Framework Decision was adopted to supplement the Directive as the instrument by which the European Union intended to approximate criminal-law legislation of the Member States.³ It provided that the Member States, in order to attain the objective pursued by the Directive, should regard certain offences specified in the Directive as criminal offences and provide for criminal penalties. Furthermore, it contained detailed provisions on the nature, type or levels of the criminal penalties that should be applied by the Member States in case of ship-source pollution caused with intent or by serious negligence.

Both the Directive and the Framework Decision were recently challenged before the European Court of Justice (hereinafter: the Court).

The Directive was challenged by a broad coalition of the maritime shipping industry led by INTERTANKO and representing substantial proportions of that industry. The applicants were supported by the Member States Greece, Cyprus and Malta. They argued, that the Directive was invalid because of a conflict with the international regime for criminal liability for ship-source pollution which binds the Member States by MARPOL 73/78 and UNCLOS 1982. While MARPOL 73/78 only imposes liability for polluting offences in case of “intent” or “recklessness”, the Directive requires the Member States to introduce penalties in cases of “serious negligence.” On 3 June 2008 the Court delivered its judgment in this case. It ruled that the validity of the Directive cannot be assessed by reference to MARPOL or UNCLOS and that consequently the Directive is valid.⁴

In contrast to this case, the Framework Decision was not challenged by opponents to a strict pollution regime inside the European Union, but by the Commission itself. The Commission based its appeal on competence issues, stating that the Framework Decision was adopted on the wrong legal basis. The Court on 23 October 2007⁵ followed the Commission`s appeal and annulled the Framework Decision. It held that some provisions

³ See also: *Commission v Council* (C-440/05) [2007] ECR I-09097, para 3.

⁴ *Intertanko v The Secretary of State for Transport* (C-308/06) [2008] ECR 000.

⁵ *Commission v Council* (C-440/05) [2007] ECR I-09097, para 3.

of the Framework Decision could have been validly adopted by the Community, and that consequently the adoption of the Framework Decision by the Council under the third pillar infringed on Community competences.

The annulment of Framework Decision 2005/667/JHA in Case C-440/05⁶ (*Marine Pollution*) constituted a new “milestone” in the complex process of “Europeanization” of criminal law and received a lot of attention. Concerning the EU’s combat against ship-source pollution, several questions arise out of the annulment.

First, it has to be asked how this judgment affected the sanctions regime for ship-source pollution offences. There has been some dissension between commentators as to the question, if the decision rather weakened or strengthened the EU’s legal framework on maritime safety. While the shipping industry viewed the decision as a blow against the EC’s overhasty legislative responses to the ERIKA and PRESTIGE disasters, legal scholars rather interpreted it as possibly strengthening the fight against ship-source pollution since more competences were conferred to the supranational first pillar.

The next question is, which possibilities the EC has to act in response to the judgment in order to fill the legal vacuum that was created by the annulment of the Framework Decision. Considering the legislative competences of the Community, what would be the most effective means to achieve the aims pursued with the Framework Decision? Should the Community really stick to criminal law related measures or could other means like administrative sanctions be equally effective to protect the maritime environment?

To answer these questions, it will be necessary to look at the scope of the Community’s competences in criminal law - how did things develop in this field before the judgment in *Marine Pollution*, what were the grounds for the annulment of the Framework Decision and most important, what are the implications to be drawn for the future from the decision? Furthermore, this paper will consider administrative sanctions as a possible alternative to criminal law in the Community’s efforts to promote maritime safety. The Community has for a long time utilized administrative sanctions as a remedy to enforce compliance with

⁶ Commission v Council (C-440/05) [2007] ECR I-09097.

Community law. The most prominent sectors are hereby competition law⁷ and agriculture,⁸ which will be considered in more detail below. However, concerning ship-source pollution, the Commission sticks to criminal law as a “necessary instrument in the fight for an effective enforcement of the rules on maritime safety.”⁹ The vindicability of this assumption will be questioned, especially in respect of the necessity to introduce criminal sanctions in the field of maritime safety.

Chapter two of the thesis starts to touch briefly on the legal basis of Community acts in the maritime safety sector. Then, an analysis of the status of criminal law in the European Community follows. First, the standing of criminal law in legal systems is examined in general. Second, the competences of the Community in the field of criminal law are illustrated. Emphasis is put on the recent developments in the Europeanization of criminal law, especially on a landmark case of the Court in environmental matters of 1995 and on the recent annulment of Framework Decision 2005/667/JHA. By this, the limits of the Community concerning the adoption of criminal provisions in the field of maritime safety will be illustrated.

Chapter three goes on to analyse which effects the annulment of Framework Decision 2005/667/JHA has on the European fight against ship-source pollution. The annulled provisions are examined in detail. Further the presently pending legislative response of the Commission to the annulment is illustrated. The chapter moreover contains a discussion of some possible future implications of the annulment.

Chapter four examines, if administrative sanctions could be an appropriate alternative to criminal penalties in the fight against ship-source pollution. To this end, administrative sanctions are first generally classified. Following, there is an overview of administrative sanctions in the legal system of the Community, with an emphasis on competition law and the agricultural sector. Thereafter, it is examined in an analogy to the sanction systems in the latter areas, if and to which extent these systems could be conferred to the field of

⁷ See: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, page 1.

⁸ Confer: Germany v Commission (C-240/90) [1992] ECR I-5383.

⁹ EUROPA – Rapid – Press Releases: “Questions and Answers on criminal law measures against maritime pollution”, MEMO/08/156, 11 March 2008.

maritime safety. Finally, the introduction of administrative sanctions in maritime safety will be discussed in respect of aspects like effectiveness, the culpability of legal persons and the international character of the shipping industry.

Finally, in the concluding fifth chapter, some arguments are set out why the introduction of administrative sanctions on Community level seems to be an appropriate alternative to criminal penalties in the field of maritime safety.

2 The Union`s Legislative Scope of Action

2.1 The Union`s Legislative Scope of Action Regarding Maritime Safety

According to Article 1 EU, the European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe and is based on the Communities, supplemented by the policies and forms of cooperation established by the EU Treaty itself.

There are accordingly three different pillars¹⁰ under the “roof” of the Union: The first or “Community pillar”, the second, which covers common foreign and security policy (Title V) and the third, which concerns police and judicial cooperation in criminal matters (Title VI). While the Community pillar is “supranational”,¹¹ the second and third pillars are classified as “more governmental.”¹² Accordingly, the measures adopted under the latter are more of an international law nature and lack direct effect.¹³

The founding Treaties of the European Communities conferred a range of competences to the Communities` institutions. As a starting point, the Community institutions have to take into consideration both the contents and the limitations of their competences under the EC Treaty every time they act. According to what is generally known as the “principle of attributed powers” or the principle of positive legality, the Community may only exercise as much power as is conferred on it by the founding Treaties.¹⁴ This principle is explicitly

¹⁰ Note that the „pillars“ of the EU will be abolished if the Treaty of Lisbon comes into force.

¹¹ See the judgments in: Van Gend&Loos (C-26/62) [1963] ECR 1; Costa/ENEL (C-6/64) [1964] ECR 585.

¹² Opinion of AG Mazak in Commission v Council (C-440/05) [2007] ECR I-09097, paras 45, 46.

¹³ Ibid.

¹⁴ Von Bogdandy, Armin and Bast, Jürgen, “The European Union`s Vertical Order of Competences: The Current Law and Proposals for Reform”, *Common Market Law Review* (2002), No 39, page 232.

laid down in Art. 5(1) EC.¹⁵ The Community thus has no general legislative competence, but can only act if a particular competence is conferred on it by an enabling provision. These competences of the Community as such are called “vertical competences”, whereas the distribution of competences among the institutions is labelled “horizontal competences.”¹⁶

Regarding the field of maritime safety, Article 80(2) EC Treaty empowers the Council to decide “whether, to what extent and by what procedure appropriate provisions, may be laid down for sea and air transport.” The Court has interpreted this provision as conferring broad legislative powers upon the Community and ruled that the Community is competent to lay down, inter alia, “measures to improve transport safety” and “any other appropriate provisions” in the field of maritime transport.¹⁷

Consequently, Directive 2005/35/EC was adopted on the legal basis of Article 80(2) EC as the adequate enabling norm. Since Article 80(2) EC was accepted by the Court as legal basis for the Directive, the question whether the Directive also could have been based on the Community’s competence in environmental policy according to Art.175 EC does not need any further examination.¹⁸

In contrast to the Directive, Framework Decision 2005/667/JHA was adopted on basis of the Union’s third pillar, in particular Articles 31(1)(e) and 34(2)(b) EU. Title VI of the EU Treaty aims at providing citizens with a high level of safety within an area of freedom, security and justice, by means of common action among the Member States in the fields in question, in order to prevent combat and crime. This is to be achieved, inter alia, through the approximation of national rules on criminal matters.¹⁹ One of the tools created for these purposes is the framework decision, which promotes the approximation of national statutory and regulatory provisions.²⁰ Like directives under the first pillar, framework decisions are according to Article 34 EU binding as to the result to be achieved, leaving to

¹⁵ Article 5 EC states: „The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.“

¹⁶ Von Bogdandy, Armin and Bast, Jürgen, *supra*, note 14, page 235.

¹⁷ Commission v Council (C-440/05) [2007] ECR I-9097, para 58.

¹⁸ Regarding this question see: AG Mazak, *supra*, note 12, paras 126-129.

¹⁹ Article 29 EU.

²⁰ Opinion of AG Colomer in Commission v Council (C-176/03) [2005] ECR I-7879.

the national authorities the choice of form and methods. But, unlike directives, they never have direct effect.

According to the foregoing, the Directive 2005/35/EC to combat ship-source pollution via the introduction of sanctions was adopted under the “supranational” first pillar, but the framework decision designed to supplement this Directive was adopted under the “more intergovernmental” third pillar only. This splitting between Community and intergovernmental competence via a so – called “double-text” mechanism was in the past applied several times due to the limits of the legislative competences of the Community.²¹

2.2 Criminal Law in the European Community

2.2.1 Classification of Criminal Sanctions in Legal Systems

Criminal law as such is supposed to sustain peaceful coexistence by ensuring law and order in legal systems and to protect both the society and the individual against substantive breaches. In doing so, criminal law avails itself of the authority`s fiercest means, namely the public imposition of penalties. Criminal penalties constitute the authority`s strongest interference with the individual`s rights and are therefore often classified as the “ultima ratio” in the range of legal instruments.²² So, being the “last resort” of public force, criminal sanctions shall only be imposed, if the sanctioned behaviour is not only prohibited, but especially harmful to society and its prevention therefore deemed particularly important.²³

The means that are available to criminal law to achieve its aims are the official disapproval of certain acts and the imposition of penalties.²⁴ Criminal sanctions can be imprisonment, the imposition of fines or the infliction of other disadvantages on the wrongdoer.

It is widely acknowledged that criminal sanctions are distinguished from other punitive measures of the authority by a distinct “ethical dimension” of criminal law. This ethical

²¹ Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C 176/03 Commission v Council), COM (2005) 583 final.

²² Jescheck, Hans-Heinrich, “*Lehrbuch des Strafrechts – Allgemeiner Teil*“, page 3.

²³ Appel, Ivo, “*Verfassung und Strafe*“, page 23.

²⁴ Ibid., at page 20.

dimension is said to be embodied in a moral disapproval by society of the wrongdoer's acts.²⁵ Criminal sanctions implicate this moral disapproval, thereby stigmatizing the wrongdoer in public, which is supposed to constitute a distinct evil for him.

As to the aims of criminal law, it is widely agreed on, that the primary purpose of criminal sanctions is to re-establish law and order and to avoid future breaches. According to the European Court of Human Rights "the aims of prevention and reparation are consistent with a punitive purpose."²⁶

Reparation hereby means that a breach is compensated by the imposition of a proportionate punishment, which expresses public disapproval of the sanctioned behaviour and thereby reassures the existing legal order.²⁷

Prevention is above all supposed to be achieved by the dissuasive or deterrent nature²⁸ of criminal law. First, the sanctioned wrongdoer shall be kept from committing further breaches by the memory of the disadvantages he suffered. Second, every member of the legal system shall be deterred from committing criminal offences by the fear of sanctions. In addition, it is often stated that criminal law as a legal system's "last resort" embodies the social standards underlying that system, and is therefore closely related to the identity of that particular community.²⁹

2.2.2 Community Competence in Criminal Law

The law of the European Community and the criminal law of the Member States have for a long period existed alongside each other, without considerable contact points. This is due to the fact, that there was no conferment of powers on the Community in this field when the founding Treaties were signed.³⁰ In fact, the EC Treaty only expressly refers to criminal

²⁵ Heitzer, Anne, "Punitive Sanktionen im Europäischen Gemeinschaftsrecht", 1997, page 10.

²⁶ Cf. Welch v United Kingdom (1995) ECHR A307-A.

²⁷ Jescheck, Hans-Heinrich, *supra*, note 22, page 11.

²⁸ Cf. AG Mazak, *supra*, note 12, para 71.

²⁹ Ibid.

³⁰ Tiedemann, Klaus, „Europäisches Gemeinschaftsrecht und Strafrecht“, *Neue Juristische Wochenschrift* (1993), No 1, page 23.

law to preclude a Community criminal competence in certain areas, like e.g. customs cooperation.³¹ Criminal law has traditionally been considered to be at the core of national State sovereignty³² and it is consequently widely acknowledged, that the Community has no competence in criminal law. Accordingly, the ECJ has several times set out in its case law, that “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence.”³³

The lack of a Community competence in criminal law regards both the “jurisdiction to prescribe” and the “jurisdiction to enforce”.³⁴ This means, the Community can in principle neither adopt provisions on criminal offences, nor can its organs impose criminal sanctions.

However, this does not mean, that criminal matters are “the exclusive preserve” or “domaine réservé” of State sovereignty.

First, Community law requires that the Member States protect Community interests in the same way as national interests. In the so-called Greek Maize – scandal the Court held, that infringements of Community law must be penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.³⁵

Second, Community law affects national criminal law in a negative dimension: The Member States must not create criminal offences that contradict Community law, such as e.g. the principle of proportionality or the fundamental freedoms.³⁶ In this case, convictions

³¹ Article 135 EC.

³² Miettinen, Samuli, “Constitutional limits of European Community criminal law”, Montreal 2007, <http://www.edgehill.ac.uk/law/Profiles/SMiettinenPro.htm> [Visited 10 August 2008], page 2.

³³ See: *Casati* (C-203/80) [1981]ECR 2595, para 27; *Lemmens* (C-226/97)[1998]ECR I-03711, para 19; *Commission v Council* (C- 176/03) [2005]ECR I-7879, para 47; *Commission v Council* (C-440/05) [2007] ECR I-9097, para 66.

³⁴ Tiedemann, Klaus, *supra*, note 30, page 24.

³⁵ *Commission v Greece* (C-68/88) [1989]ECR 2965, paras 24, 25.

³⁶ Tiedemann, Klaus, *supra*, note 30, page 25.

on grounds of such provisions are themselves incompatible with Community law, and Community law can require the repeal of these national laws.

Third, the Community has during the last years adopted several directives, which contained a duty of the Member States to ensure compliance with the Community rules by the imposition of sanctions. These directives concerned mostly white-collar criminality, such as money laundering, insider-trading or import/export of dangerous waste materials.³⁷

However, due to the Community's lack of criminal competence, these Directives could not contain the order to impose criminal sanctions. The decision, if the sanctions regime should be of a civil, administrative or criminal law nature therefore rested with the Member States.³⁸ A duty to impose criminal penalties could only arise out of the reasoning in *Greek-Maize*, if the Member States had decided to introduce criminal penalties for protection of a comparable national law. Moreover, regarding the effect of these directives it should be borne in mind, that Community rules can generally only be enforced against Member States, not individuals. When a Member State fails to implement a directive, the Commission can initiate an infringement procedure according to Art. 226 EC against this State. As neither infringement proceedings nor any other remedies for non-compliance with Community directives can be applied to individuals, they can only be affected by the punitive aspects of Community criminal law, if Member States fulfil their duty to implement directives into their national legal systems.³⁹

Thus, while the Community has no competence to adopt criminal law provisions on its own, it is widely acknowledged that the EC can restrict the Member States in their criminal law legislation and also instruct them to sanction certain acts in their legal systems.⁴⁰ Criminal law is thereby clearly a part of the European integration process, even if a restricted one.

³⁷ Dannecker, Gerhard, „Strafrecht in der Europäischen Gemeinschaft“, *Juristenzeitung* (1996) No 18, page 870.

³⁸ Pohl, Tobias, „Verfassungsvertrag durch Richterspruch – Die Entscheidung des EuGH zu Kompetenzen der Gemeinschaft im Umweltstrafrecht“, *Zeitschrift für Internationale Strafrechtsdogmatik*, (2006) No 5, page 213.

³⁹ Miettinen, Samuli, *supra*, note 32, page 14.

⁴⁰ Dannecker, Gerhard, *supra*, note 37, page 873.

2.2.3 Recent Developments Regarding the “Europeanization in Criminal Law”

The status of Community competences in criminal law as described above was notably affected by two recent judgments of the ECJ, which received a considerable amount of attention both from legal scholars and the European institutions themselves. In *Commission v Council (C-176/03)*⁴¹ (*Environmental Legislation*), the Court ruled that although criminal law as such is no Community policy, the Community has the implied power to harmonise criminal laws of the Member States in relation to the protection of the environment. Following this judgment, the Court in *Marine Pollution*⁴² regarding the annulment of the Framework Decision on ship-source pollution, affirmed its ruling in *Environmental Legislation*, thereby showing that it would stick to the new course. Moreover, it extended the Community’s power to harmonise criminal laws to legal acts which were not based on the Community’s competences in environmental policy according to Art.174, 175 EC.

In both cases, the Court annulled Framework Decisions regulating criminal law related measures on grounds of an infringement of the Community’s competences. In the eyes of the Court Article 47 EU, according to which none of the provisions of the EC Treaty is to be affected by a provision of the EU Treaty, establishes the primacy of EC law over EU law. According to its case law it is therefore “the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.”⁴³ In other words, if the EC Treaty confers a competence on the Community, the Union’s institutions are in this area banned from acting under the second or third pillar. Both cases did consequently not concern the question, if the Union as such had the competence to regulate, but the delimitation of competences between the first and third pillar.

⁴¹ *Commission v Council (C-176/03)* [2005] ECR I-7879.

⁴² *Commission v Council (C-440/05)* [2007] ECR I-9097.

⁴³ *Commission v Council (C-170/96)* [1998] ECR I-7879, para 39; however, it was criticized by commentators that the Court failed to give a reason for the primacy of EC law, confer e.g. Emmans, Anna-Maria, “Die strafrechtliche Annexkompetenz der EG umfasst nicht Art und Mass der einzuführenden Kriminalstrafen – sie besteht aber auch jenseits des Umweltrechts, *European Law Reporter* (2008) No 3, page 103; Pohl, Tobias, *supra*, note 38, page 217.

For this reason commentators also advance the view, that the issue of a Community criminal competence primarily concerns the horizontal division of competences in the Union rather than the criminal liability of individuals.⁴⁴

2.2.3.1 The Judgment in Environmental Legislation (C-176/03)

The proceedings in *Environmental Legislation* dealt with the validity of Framework Decision 2003/80/JHA “on the protection of the environment through criminal law”. The Framework Decision required the Member States to prescribe criminal penalties in respect of certain environmental offences. The Commission argued that both the purpose and content of the Framework Decision were within the scope of the Community’s powers in environmental policy. The Court followed this opinion and found that provisions of the Framework Decision could have been validly adopted under the Community’s competence in environmental matters as laid down in Art. 175 EC.

The Court recalled its former case law by stating that “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence.”⁴⁵

However, this should not prevent “the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”⁴⁶

According to this ruling there is only one requirement to be met for the Community to require the Member States to introduce criminal sanctions: The imposition of criminal penalties must prove itself “necessary” to ensure full effectiveness of the Community rules. The judgment however fails to give further criteria, how to establish this “necessity” of criminal sanctions and the Opinion of AG Colomer is not helpful on this issue. He only

⁴⁴ Confer e.g. Miettinen, Samuli, *supra*, note 32, page 1.

⁴⁵ Confer, *supra*, note 33.

⁴⁶ Commission v Council (C-176/03) [2005] ECR I-7879, para 48.

points to the importance and fragility of environmental interests and states that criminal law is the only “effective, proportionate and dissuasive” response to environmental offences.⁴⁷

The statements which the Court made in *Environmental Legislation* were interpreted in different ways.

The Commission issued a communication⁴⁸ and the European Parliament issued a resolution⁴⁹ in response to the judgment, in which both institutions elaborate on the effects of the judgment. Both institutions interpret the judgment broadly and think, that the Court’s reasoning is not limited to the protection of the environment. Instead, it shall be applicable to any sector under the first pillar, where the Community deems it necessary to ensure effectiveness of Community law provisions by criminal law measures.⁵⁰

In contrast to this understanding of the judgment, the Council and the Member States have interpreted the judgment more narrow, meaning that it should be understood as relating only to the field of environmental policies.⁵¹ Following this opinion, the Community’s competence to require the Member States to impose “effective, proportionate and dissuasive criminal penalties” would be restricted to the protection of the environment only.

It should moreover be noted, that Advocate General Colomer in his opinion delivered in *Environmental Legislation* touched upon the question of the extent of the penalties that are to be applied by the Member States.

In this regard, he stated that “no one is in a better position to assess the feasibility, appropriateness and effectiveness of a punitive response than the national legislating authorities.”⁵² However, the Court did not address the issue, whose responsibility it should be to determine the type and level of penalties in its judgment.

⁴⁷ Opinion of AG Colomer in *Commission v Council* (C-176/03)[2005]ECR I-7879, paras 75, 86.

⁴⁸ Communication from the Commission, *supra*, note 21.

⁴⁹ European Parliament resolution on the follow-up to Parliament’s opinion on environmental protection: combating crime, criminal offences and penalties, B6-0544/2006.

⁵⁰ Communication from the Commission, *supra*, note 21, para 8.

⁵¹ AG Mazak, *supra*, note 12, paras 7, 37.

⁵² AG Colomer, *supra*, note 20, para 48.

Though it is without any legal effect, it should be mentioned, that the judgment was widely criticized by legal scholars and practitioners. The first point of criticism was that the criterion of “necessity” is no real requirement, but only a pseudo-requirement.⁵³ According to the Court’s ruling, criminal sanctions are necessary when the Community considers them necessary. The necessity of a measure is consequently only dependent on the Community’s discretion, which makes a review on ground of objective criteria impossible. Moreover, the decision was criticized for anticipating the Treaty of Lisbon.⁵⁴ Article 83(2) of the Treaty of Lisbon establishes a legislative competence of the Community in criminal law as the Court founded by its judgement.

2.2.3.2 The Judgment in *Marine Pollution*

Following the judgment in *Environmental Legislation*, the Commission issued a list of the acts adopted and pending proposals which it deemed to be affected by the judgment and which it deemed to require amendment.⁵⁵ The only case where the Commission had the possibility to introduce an appeal for annulment within the procedural deadlines was the appeal to the Court for annulment of the Council Framework Decision 2005/667/JHA. The appeal led to proceedings that were quite parallel to those in *Environmental Legislation* and as seen above, the Court annulled Framework Decision 2005/667/JHA because some of its provisions could have been validly adopted under the first instead of the third pillar.

With the ruling in *Marine Pollution* the Court affirmed its judgement in *Environmental Legislation* and moreover it at least partly addressed and cleared the issues that were raised by this former judgment. Framework Decision 2005/667/JHA contained provisions that requested the Member States to regard certain offences regarding ship-source pollution as criminal offences. Moreover, it contained detailed provisions on the type and level of the penalties that should be adopted by the Member States in case of an infringement. These

⁵³ Hefendehl, Roland, „Europäischer Umweltschutz: Demokratiespritze für Europa oder Brüsseler Putsch?“ *Zeitschrift für Internationale Strafrechtsdogmatik* (2006) No 4, page 164.

⁵⁴ See e.g. Emmans, Anna-Maria, *supra*, note 43, page 106.

⁵⁵ See: Communication from Commission, *supra*, note 21.

provisions should provide for an approximation of sanction levels for the same kind of offences in the different Member States.

The Court found that the provisions of the Framework Decision which requested the Member States to impose criminal sanctions for certain offences could have been validly adopted by the Community. What distinguishes *Marine Pollution* from *Environmental Legislation* hereby is, that the legal basis in the EC Treaty to adopt those provisions was not held to be Art. 175 EC but Art. 80(2) EC. Directive 2005/35/EC is based on Art. 80(2) EC, which gives the Community the power to regulate in air and sea transport.

The Court in this regard stated, that the Community legislature has broad legislative powers under Article 80(2) inter alia regarding “measures to improve transport safety” and “any other appropriate provisions”⁵⁶ in the field of maritime transport. It found that the main purpose of the Framework Decision was the promotion of maritime safety and that it therefore belonged to the range of legislative measures that could be validly adopted under Art.80(2) EC.

Then the Court went on to renew its central statement in *Environmental Legislation*, namely that “when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective.”⁵⁷

By this ruling, the Court regrettably failed to give clear guidance on the question, if the Community is only competent to provide for criminal provisions in environmental policies or if this competence also exists in other sectors, if this is “necessary” to ensure effectiveness of the Community rules.

Advocate General Mazak addressed the issue in his opinion on the case. He stated that the reason for the existence of the Community`s power to require the Member States to use the tool of criminal enforcement was the “general principle of effectiveness underlying

⁵⁶ Commission v Council (C-440/05) [2007]ECR I-9097, para 58.

⁵⁷ Ibid., at para 66.

Community law”. He concluded, that this power therefore ”must in principle also exist in relation to any other Community policy area, such as transport.”⁵⁸

The judgment however did not give a clear response to his opinions. On one side, it was held that regarding ship-source pollution the provisions providing for criminal penalties could be based on the Community`s competence in the transport sector. On the other side the Court referred to the protection of the environment several times, pointed to the “horizontal character” of this Community objective and stressed the fact that the Framework Decision aimed at improving protection of the marine environment.

What can be said is, that the Court in any case did not affirm a general transferability of the judgment in *Environmental Legislation* to other Community competences on ground of effectiveness.⁵⁹ However, the judgment at least widened the Community`s criminal competences in so far as the power to require the Member States to impose criminal sanctions can be transferred to other sectors than the environmental policy, if the measures in question also aim at the “horizontal” matter of protection of the environment, which according to Art. 6 EC has to be integrated into all Community policies.

Accordingly, most commentators do not believe that the Court in future is going to restrict the Community`s power to harmonise criminal laws to the protection of the environment, but that it will be extended to other Treaty objectives like e.g. the fundamental freedoms.⁶⁰

The other important aspect of the judgment in *Marine Pollution* regards the specification of sanctions that should be imposed by the Member States to penalize the infringements laid down in the Directive. Whereas the Court widened the Community`s power to provide criminal law provisions, it drew a clear line of the Community`s competences regarding the sanctions.

In the judgment it simply states without further reasoning, that “the determination of the type and level of the criminal penalties to be applied does not fall within the Community`s sphere of competence.”⁶¹

⁵⁸ AG Mazak, *supra*, note 12, para 99.

⁵⁹ See also regarding this question: Fromm, Ingo, “Urteilsanmerkung EuGH Urteil vom 23.10.2007 – C-440/05”, *Zeitschrift für Internationale Strafrechtsdogmatik* (2008) No 3, page 174.

⁶⁰ See e.g.: Emmans, Anna-Maria, *supra*, note 43, page 106 ; Fromm, Ingo, *supra*, note 59, page 174.

The Court thereby follows the line that was already set out by AG Colomer in his opinion in *Environmental Legislation*, which was neither affirmed nor rejected by the Court because it did not address this issue in the former decision. AG Mazak⁶² agreed with AG Colomer and provided some further reasoning, why the specification of penalties should lie with the Member States. He pointed out that each Member State`s criminal code reflects a particular ranking of the legal interests which it seeks to protect. Further he followed the UK government`s argument, that a given level of fine can send out very different messages in different Member States regarding the seriousness of the offence in question.

The Framework Decision was annulled in its entirety, since the Court regarded it to be indivisible.

⁶¹ Commission v Council (C-440/05) [2007] ECR I-9097, para 70.

⁶² AG Mazak, *supra*, note 12, paras 103-108.

3 Effects of the Judgment in *Marine Pollution*

3.1 Provisions of Framework Decision 2005/667/JHA – Content and Grounds for Annulment

The provisions of the annulled Framework Decision can be largely divided into three groups.

Articles 2, 3 and 5 required the Member States to apply criminal penalties to certain forms of conduct. According to Article 2, the infringements laid down in Articles 4 and 5 of Directive 2005/35/EC should be regarded as criminal offences by the Member States. Article 3 established that also aiding, abetting or inciting such an offence should be criminally punishable. And Article 5 concerned the liability of legal person for those offences. The Court held that these Articles could have been validly adopted by the Community on the basis of Article 80(2) EC.

Articles 4 and 6 contained detailed provisions as to the type and level of penalties that should be applied by the Member States for those offences. Article 4 dealt with penalties for natural person and set up time frames for the length of custodial penalties. For example, an intentionally committed offence as referred to in Article 2, that caused significant damage to the marine environment and the death or serious injury of persons should be punished by a “maximum of at least between five and ten years of imprisonment.” Article 6 concerned penalties against legal persons and contained specifications as to the amounts of fines that should be applied, e.g. in the most serious cases a maximum of at least between 750 000 and 1 500 000 Euro. Regarding these provisions, the Court held that the determination of the type and level of criminal penalties does not fall within the Community’s competence, so that they could not have been validly adopted under the first

pillar. However, since these Articles make references to Articles 2, 3 and 5 they were considered to be inextricably linked to those provisions. Being indivisible from those provisions, Articles 4 and 6 also had to be annulled.

Articles 7, 8 and 9 concerned the establishment and co-ordination of jurisdiction, a mechanism for the exchange of information on the commission of criminal offences and the establishment of contact points to that end. Articles 10, 11, 12 respectively concerned territorial scope of application of the Framework Decision, the implementation obligation on Member States and the date of entry into force of the Framework Decision. The Court did not elaborate on the question, if these provisions could have been validly adopted under the first pillar, since it established that they were in any case inextricably linked with the other provisions of the Framework Decision. However, it is possible to find more guidance on this in AG Mazak's opinion, who found that at least Articles 7, 8 and 9 were outside the Community's competence to criminalise certain conduct.

After the annulment of the Framework Decision in *Marine Pollution*, the contents of these provisions were naturally lost as a part of the EU's legislative package to promote marine safety. To fill this "legal vacuum" the Commission in March 2008 released a proposal for an amending Directive 2005/35/EC. According to recital one of the proposal's preamble, it is the purpose of the amending Directive to "approximate the definition of ship-source pollution offences committed by natural or legal persons, the scope of their liability and the criminal nature of penalties that can be imposed for such criminal offences by natural persons".

The new proposal amends Directive 2005/35/EC without changing its substance, by incorporating in the directive those provisions of the annulled Framework Decision, which prescribed that ship-source pollution committed with intent, recklessly or with serious negligence should be considered a criminal offence.⁶³ There are thus no substantial amendments to the offences originally created by the "double-text mechanism" or to the levels of culpability necessary to commit an offence under the Directive.

⁶³ Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements, COM (2008) 134 final.

Articles 4, 6 and 7 to 12 however did, due to the limits of the Community's legislative powers as confined by the Court in its judgment, not find their way into the amending Directive. There were also no efforts from the Council to re-establish these provisions in a new, separate Framework provision. Consequently, regarding the content of these provisions, the Commission did not manage to fill the legal vacuum.

3.2 Possible and Actual Effects of Amending Directive 2005/35/EC on the Combat against Ship-Source Pollution

In case of adoption of the proposal for the amending directive, those provisions of the Framework Decision, which required the Member States to impose criminal penalties will be removed from the more governmental third pillar to the supranational first pillar.

One is here not dealing with a purely technical matter concerning only the horizontal division of competences in the Union; in fact this deferral would entail some far-reaching consequences. In contrast to Community provisions, Framework Decisions have no direct effect,⁶⁴ a failure to transpose them cannot be overcome by an action for infringement as provided for in Art. 226 EC, and the Court's jurisdiction to give rulings on the validity and interpretation of Union legal instruments according to Art. 35 EU is not compulsory, since this jurisdiction is subject to acceptance by the Member States.⁶⁵ Hence, the means to ensure compliance with acts adopted under the first pillar are much more effective than under the third pillar. These limits to the effects of Framework Decisions result in a weaker independent legal standing of acts adopted under the third pillar compared to acts adopted under the first pillar.

Consequently, the annulment of the Framework Decision will, in case of the adoption of the amending Directive, bring about a strengthening of the Union's legal framework to promote maritime safety with regard to the criminalization of ship-source pollution.

However, it should be remembered that the adoption of the amending Directive requires a qualified majority of the Member States represented in the Council according to its legal

⁶⁴ Article 34(2)(b) EU.

⁶⁵ AG Colomer, *supra*, note 20, para 4.

basis, Article 80(2) EC. Although the provisions were adopted unanimously by the Council in the Framework Decision, this does not automatically mean that there will be a qualified majority voting for the same provisions in the Directive. The Member States are traditionally suspicious when it comes to transferring competences in criminal law as a “core area” of national sovereignty to the Community.⁶⁶ This assumption was just recently affirmed by the fact that Member States like Greece, Cyprus and Malta supported the applicants in “Intertanko” in their fierce resistance against Directive 2005/35/EC. It is therefore hardly imaginable that these Member States would agree to the stipulation of criminal liability under the Directive itself. So, even if the Commission succeeded in widening the Community’s competences, regarding the fight against ship-source pollution, this might have been a Pyrrhic victory.⁶⁷

3.3 Possible and Actual Effects of the Waiver of an Approximation of Sanction Levels on the Combat against Ship-Source Pollution

Articles 4 and 6 of Framework Decision 2005/667/JHA contained detailed provisions as to type and level of penalties and were aiming at the approximation of sanction levels regarding ship-source pollution in the Member States. Due to the Court denying a Community competence to rule on “type and level” of penalties, these provisions can not be included in the amending directive. And since there was also no new legislative action on Union level, the legal vacuum created here will persist for an indefinite period of time.

The Commission acknowledges that different sanction levels in the Member States bring about the risk to provide for safe havens for offenders. However, it considers its hands bound by the Court’s judgment. Concerning its future actions in this area, the Commission therefore only states that it “continues to believe that the approximation of sanction levels is an important issue and [that it] will reconsider the possibility and need for a legislative proposal in due course.”⁶⁸

⁶⁶ Confer: Miettinen, Samuli, *supra*, note 32, page 4.

⁶⁷ Hefendehl, Roland, *supra*, note 53, page 166.

⁶⁸ EUROPA Press Releases, *supra*, note 9.

Taking into consideration the international character of the shipping industry, it is quite difficult to understand this laid-back attitude of the Commission. Considerably differing sanction levels in the Member States undoubtedly contravene the Directive's aim of protection of the environment.

Thinking about illegal voluntary discharges, polluters are given the possibility to choose to discharge oil or other harmful substances in the waters of Member States which have lower sanction levels than neighbouring Member States. However, discharges do of course not only affect the State in whose waters the discharge occurs. Polluting substances in the seas spread and consequently also affect States which would like to protect their seas by the dissuasive effect of higher sanction levels. Their efforts could be "sabotaged" by the laxer attitude of other States. Yet, if a polluting act that affects several Member States is substantial enough to be discovered quickly and can be traced back to the producer, several States could claim criminal jurisdiction, respectively applying a different system of sanctions. Situations like these are likely to cause legal uncertainty as to the criminal consequences of the very same actions.

These effects become even more severe in the case of accidents caused by serious negligence. As seen above, Directive 2005/35/EC requires the Member States to regard polluting offences caused by "serious negligence" as criminal offences, in contrast to the standard of "recklessness" as laid down in MARPOL 73/78. Major shipping nations like Greece, Cyprus and Malta supported the applicants in Intertanko and strongly contradicted the "serious negligence" approach because they fear it will lead to a criminalizing of innocent mistakes.⁶⁹ Greek commentators even perceive the "sword of Damocles hanging over the oceans" for private persons involved in the shipping industry.⁷⁰ In opposition to this, several other Member States like Spain or Sweden, opposed to the application of the industry coalition in Intertanko. With this background, it is easy to foresee, that a free choice of penal sanctions will lead to considerably differing sanction levels when it comes to offences committed with serious negligence. One does not need visionary abilities to

⁶⁹ <http://www.intertanko.com/upload/ECJ%20judgment%20-%20briefing%20note%20FINAL.pdf> [visited on August 13, 2008].

⁷⁰ Christodoulou-Varotsi, Illiana, "Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC's Penal Approach", *Transportation Law Journal* (2007) No 6, page 381.

foresee, that sanction levels in Greece, Cyprus and Malta will probably be considerably lower than in other Member States. These Member States of course make their ports more interesting for the shipping industry, which in turn could have a negative effect on the establishment of an internal market.

Hence, the waiver of an approximation of sanction levels will probably have considerable practical effects on the European combat against ship-source pollution.

3.4 Preliminary Conclusions to be Drawn from the Annulment of Framework Decision 2005/667/JHA

The Community is, according to the Commission in the field of maritime safety turning to the criminal law as a “necessary instrument for an effective enforcement of the rules.”⁷¹ The International Convention for the Prevention of Pollution from Ships (MARPOL), to which all EU Member States are parties and thereby bound to adhere to its provisions, stipulates in Article 4(4) that penalties must be “adequate in severity to discourage” potential polluters. Referring to this provision, the Commission holds the opinion that “the deterrent effect of the system of sanctions must be reinforced, sending a strong signal, with a much greater dissuasive effect, to potential offenders.”⁷² This view is also set out in the explanatory memorandum to the amending directive, which moreover states that “criminal investigation and prosecution and judicial cooperation between Member States can be essential and more powerful than administrative action.”⁷³ The Commission thereby follows the reasoning that was already set out by Advocate Colomer in his opinion in *Environmental Legislation*, who stated that criminal law would constitute the only effective, proportionate and dissuasive response to conduct seriously affecting the environment.⁷⁴ However, neither the Commission nor AG Colomer give distinct reasons why they consider criminal law being the only effective means to protect the environment.

⁷¹ EUROPA Press Releases, *supra*, note 9.

⁷² Ibid.

⁷³ Proposal for an amending Directive 2005/35/EC, *supra*, note 63.

⁷⁴ AG Colomer, *supra*, note 20, para 86.

Hence, with this starting point, the Community restricts itself in the protection of the maritime environment to the narrow and quite unclear limits of its competences in criminal matters.

Even, if one theoretically agrees with the Commission that criminal law is the most effective means to avoid undesirable behaviour, one must still take into consideration the factual circumstances in each case.

As could be seen above, it is still not really clear, if the necessary qualified majority of Member States represented in the Council will consent to the amending directive. Moreover, the approximation of sanction levels is by no means a negligible matter and should not be left disregarded for a longer period.

If the Commission considers itself bound by the ECJ's judgment concerning the types and levels of criminal penalties, it should start to think about alternative means to achieve an effective protection of the environment. Article 8 of Directive 2005/35/EC states that Member States shall take the necessary measures to ensure that infringements are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties. Thus, in the present situation it practically suggests itself to turn to the means of administrative sanctions. Sadly, the Commission simply condemned this possibility as "less powerful" than criminal investigation and prosecution.⁷⁵ However, it can be strongly doubted, if the imposition of criminal penalties as such is automatically more powerful, as long as the decision on sanction levels is left to the single Member States.

In the following, it will therefore be examined if administrative sanctions could be as effective or even more effective to protect the environment than criminal penalties and how they could be legally construed.

⁷⁵ EUROPA Press Releases, *supra*, note 9.

4 Administrative Sanctions in the Combat against Ship-Source Pollution

4.1 Classification of Administrative Sanctions in Legal Systems

Legal systems use sanctions in situations in which individuals do not adhere to their public duties, although these are laid down in laws or have been stipulated bindingly in the course of application of the law.⁷⁶ The term “sanction” is in legal theory defined as every legal disadvantage, which is imposed on a person who has infringed upon a legal provision.⁷⁷

However, this definition does not give any guidance, whether a sanction belongs to the civil, criminal or public law sphere. Formally, administrative sanctions are sanctions which are prosecuted and imposed by administrative authorities and which contain all consequences that are inflicted on individuals if they disregard administrative duties.⁷⁸ The Member States of the European Union have shaped their systems of administrative sanctions in different ways.⁷⁹ Some States⁸⁰ have special codifications for administrative sanctions, which regulate the imposition of such sanctions in detail; others simply know the concept of sanctions which are imposed by administrative authorities.⁸¹

The distinctive criteria of administrative sanctions can be shown best by a comparison to criminal sanctions, even if it is not always easy to draw the demarcation line between these legal instruments.

⁷⁶ Ogg, Marcel, *Die verwaltungsrechtlichen Sanktionen und ihre Rechtsgrundlagen*, 2002, page 1.

⁷⁷ Heitzer, Anne, *supra*, note 25, page 6; Kadelbach, Stefan „Verwaltungsrechtliche Sanktionen bei Verstößen einzelner gegen das Gemeinschaftsrecht“, page 81, in: Van Gerven & Zuleeg (eds.) *Sanktionen als Mittel zur Durchsetzung des Gemeinschaftsrechts*, 1996.

⁷⁸ Ogg, Marcel, *supra*, note 76, page 7; Kadelbach, Stefan, *supra*, note 77, page 82.

⁷⁹ See: National Reports – Volume I, *The system of administrative and penal sanctions in the Member States of the European communities*, Luxembourg, 1994.

⁸⁰ E.g. Germany, Austria, Italy and Portugal.

⁸¹ E.g. France, the Netherlands, Greece and Belgium.

Generally, sanctions can fulfil three different functions: Prevention, reparation and suppression.⁸² Prevention aims at the hindrance of further breaches through deterrence. Reparation seeks to undo the harm inflicted on the legally protected interest. Suppression aims at avengement of the wrong done by the infliction of a personal legal or economic disadvantage.⁸³

Administrative sanctions are applied by authorities of the Member States to fulfil all these functions.⁸⁴ However, while criminal law places emphasis on the repressive function, the primary function of administrative sanctions is said to be preventive; this means they are above all applied to maintain the functioning of administrative action, to terminate a current unlawful state or to prevent certain events in the future.⁸⁵

Apart from the slightly different function, it is commonly stated that the most important difference between criminal and administrative law is the “ethical dimension”.⁸⁶ While criminal sanctions contain a social disapproval and stigmatise the wrongdoer, administrative sanctions do not aim at labelling the wrongdoer as a “criminal”.⁸⁷ It is therefore often stated, that administrative sanctions are to be considered as morally neutral measures.⁸⁸

However, not all administrative sanctions can be regarded the same, in fact, measures adopted under this label can be of a considerably different character. Broadly speaking, administrative sanctions can be divided into two categories: sanctions with a purely remedial or compensatory character and sanctions with a punitive character.⁸⁹

Sanctions with a purely compensatory character consist e.g. in the reclaim of benefits which were wrongly obtained, the subsequent invoice of duties not paid or the charge of

⁸² Schwarze, Jürgen, „Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht“, *Europäische Zeitschrift für Wirtschaftsrecht* (2003) No 9, page 265.

⁸³ Ibid.

⁸⁴ Heitzer, Anne, *supra*, note 25, page 17.

⁸⁵ Kadelbach, Stefan, *supra*, note 77, page 82.

⁸⁶ AG Colomer, *supra*, note 20, para 74.

⁸⁷ Opinion of Advocate General Jacobs in C-240/90 [1992] ECR I-05383, para 11.

⁸⁸ Eg. Heitzer, Anne, *supra*, note 25, page 15.

⁸⁹ Ligeti, Katalin, „European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law“, *Acta Juridica Hungarica* (2000), Nos 3-4, page 207.

interest on duties, which have to be paid.⁹⁰ The addressee of such measures does not suffer from a disadvantage that goes beyond his original legal duties, as these kinds of sanctions are to be assessed exactly according to the loss to be recovered. There is no infliction of a personal legal or economic disadvantage, which means that the authorities do not pursue any suppressive aim by applying such measures.

Punitive sanctions however go beyond these measures. They consist mostly in the imposition of fines,⁹¹ but can also consist in the enhancement of a due amount, the withdrawal of a licence, the ban from a profession⁹² or the forfeiture of deposits.⁹³ As a consequence to the loss which the wrongdoer has caused to others or the public a personal disadvantage is inflicted on him. Consequently, what distinguishes punitive from compensatory sanctions is that they contain a suppressive and deterrent function,⁹⁴ they are in fact penalties.

This essay will not touch upon the much discussed question, if it is at all admissible to impose penalties in the form of administrative sanctions and if, or to which extent administrative sanctions are consciously used to enhance a decriminalisation in certain areas. For the purpose of this essay it is sufficient to assert, that even if sanctions have a penal character, they can still be classified as administrative penalties. It is decisive, that they are imposed by administrative authorities, in contrast to criminal penalties, which can only be imposed by a judge.

However, due to the penal character of these sanctions the question arises, if and to what extent fundamental criminal law guarantees have to be applied. The constitutional courts of Germany, France and Spain have all acknowledged that administrative authorities have to adhere to classical criminal law guarantees like e.g. the principle of legality (*nulla poena sine lege*) when imposing sanctions with a penal character.⁹⁵ Accordingly, under the

⁹⁰ Kadelbach, Stefan, *supra*, note 77, page 81.

⁹¹ Ligeti, Katalin, *supra*, note 89, page 205.

⁹² Heitzer, Anne, *supra*, note 25, page 16.

⁹³ See: Commission Regulation No 2220/85 of 22 July 1985, OJ 1985 L 205, page 5.

⁹⁴ Confer the statements of the ECJ in ACF Chemiefarma (C-41/69) [1970] ECR 661, paras 172-174.

⁹⁵ Tiedemann, Klaus, *supra*, note 30, pages 27, 28.

codifications for administrative sanctions in Germany, Italy and Portugal, criminal law guarantees are for the most part applicable like in criminal law itself.⁹⁶

Even more important, from a more international perspective, this position has also been confirmed by the case-law of the European Court of Human Rights (ECHR). Article 6 of the European Rights Convention provides for additional and more extensive procedural and substantive guarantees with regard to criminal cases as compared with civil cases. In its widely known cases *Engel v Netherlands*⁹⁷ and *Öztürk v Germany*,⁹⁸ the ECHR held that for protection under the Convention, the formal classification made by national law is not decisive. Instead, the applicability of the guarantees under Article 6 should depend on the nature of the offence itself and the nature and severity of the sanction which can be imposed.

When it comes to the relevance of administrative sanctions in a legal system one must not forget that they are in some countries the only possibility to sanction legal persons. While corporate criminal liability is well developed in countries like the Netherlands, Denmark, the UK and Ireland, countries like Luxemburg, Portugal, Spain, Austria and Germany still lack criminal liability for corporations.⁹⁹ The adherence to the maxim “*societas delinquere non potest*” is for example justified by the fact that legal entities cannot be morally blameworthy and cannot be imprisoned.¹⁰⁰

Furthermore, it is worth mentioning, that imprisonment is generally excluded from the range of measures that can be imposed as administrative sanctions.¹⁰¹

⁹⁶ Ibid., at page 28.

⁹⁷ *Engel v Netherlands* [1979-1980] EHRR 706.

⁹⁸ *Öztürk v Germany* [1984] EHRR 409.

⁹⁹ See: Results of the study concerning the sanctions applicable on the non-observance of European Directives by Faure, Michael and Heine Günther, “Criminal Penalties in EU Member States environmental law”, in: Eser, Albin (ed.), *Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i. Br.*, Freiburg, 2000, page 334.

¹⁰⁰ Confer: National Reports, *supra*, note 79.

¹⁰¹ An exception to this rule is Austria where imprisonment up to six weeks is possible, see: Faure, Michael and Heine, Günther, *supra*, note 99, page 333.

4.2 Administrative Sanctions in the Community's Legal System

4.2.1 General Remarks on Sanctions in the Community

As seen above, neither criminal law nor criminal procedure fall within the Community's competence. However, this does not mean that the Community has to do without the application of sanctions in the case of breaches of Community rules. In fact, the Community is like any other legal system dependent on the possibility to impose sanctions to enforce its legal order.¹⁰²

Accordingly, administrative sanctions have been established in various fields of the Community legal order, like for example in competition law, merger control, transport, agriculture and fisheries. Administrative sanctions are by now a well developed means of enforcement of Community law, but there has been a lot of debate about the Community's power to establish these sanctions. Since the legal basis differs according to the Community policy in question, a closer look on the exact legal basis for Community sanctions will be taken when dealing with the different sanctions in the respective area. This essay will examine in greater detail the Community sanctions in the fields of competition law and agriculture.

Administrative proceedings in the Community can be structured in different ways. In certain areas, such as competition law and state subsidies, the administration is handled exclusively by the Community itself. For example, in competition law the Community has the power to carry out inspections by its own agents. This type of administration is within the Community legal order known as "direct administration."¹⁰³ In other areas, like for example agriculture, the Community institutions act as supervisors only, while the implementation of measures is the task of national authorities. This form of administration is what is known as "indirect administration."¹⁰⁴ In between these two models, there are various forms of administrative cooperation between Community institutions and national authorities; however, further examination of these would go beyond the scope of this paper.

¹⁰² Int. Handelsgesellschaft (C- 11/70) [1970] ECR 1125, para 25.

¹⁰³ Cassese, Sabino, „European Administrative Proceedings“, in: *The Administrative Law of the European Union*, 2004, page 21.

¹⁰⁴ Ibid.

With regard to administrative sanctions, direct administration means, that Community institutions impose a sanction themselves, after having examined the individual case in an administrative procedure.¹⁰⁵ In this procedure, the right to be heard must be granted,¹⁰⁶ and it is up to the courts of the Community¹⁰⁷ to review the decision of the Community institution in question. The national courts are not at all involved in the whole process.

In areas where the Community cannot act directly, it can instead include provisions in its legal acts providing for specific sanctions in case of breaches against these acts. These sanctions are then via indirect administration imposed by national authorities or courts,¹⁰⁸ without the involvement of any Community authority. Hence, the actors in the system of indirect administration are the Community legislator and the national administrations.¹⁰⁹ Judicial review lies with the national courts, which cooperate with the ECJ through the instrument of preliminary rulings. The implementation of Community law by the Member States is the general rule, direct administration is only applied if Community provisions expressly provide for it.¹¹⁰

The application of Community sanctions, exactly like the application of national sanctions, raises the question if, and to which extent fundamental principles and criminal law guarantees have to be considered. As seen above, the ECHR ruled, that the application of fundamental freedoms and rights as laid down in Article 6 of the European Convention of Human Rights cannot depend on the formal classifications of a measure. However, the Community has not ratified the Convention, which means that it is not directly applicable to Community law.¹¹¹ Still, Article 6 of the EU Treaty states that the Union “shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human

¹⁰⁵ E.g: Fines in Competition Law.

¹⁰⁶ See: *Fiskano v Commission* (C-135/92) [1994] ECR I-02885.

¹⁰⁷ Court of First Instance and, in a procedure limited to the review of legal questions, the European Court of Justice, Article 225 EC, Articles 58, 59 Statute of the Court of Justice.

¹⁰⁸ E.g.: The forfeiture of deposits in the field of agriculture.

¹⁰⁹ Koen von, Lenaerts, „Sanktionen der Gemeinschaftsorgane gegenüber natürlichen und juristischen Personen“, *Europarecht* (1997) No 1, page 17.

¹¹⁰ Heitzer, Anne, *supra*, note 25, page 28.

¹¹¹ According to Article 59 of the European Convention of Human Rights, the Convention can be ratified by members of the Council of Europe. According to Article 4 of the Statute of the Council of Europe, any “European State” can become a member of the Council of Europe. This formulation leaves the Community outside, it can not become a member.

Rights” and consequently the provisions of the Convention are seen as a special tool for the interpretation and as leading principles for the rights and guarantees under Community law.¹¹²

In 1995, the Council adopted a regulation on the protection of the European Communities financial interests,¹¹³ which serves as a general framework for investigating and repressing acts and omissions that by violating Community rules, cause financial harm to the Community, or could do so.¹¹⁴ The regulation provides for fundamental criminal law guarantees to be applied to Community sanctions with a punitive character. Inter alia, the regulation states that the rule of law (“nulla poena sine lege”) has to be applied and it stipulates the requirement of guilt (“nulla poena sine culpa”). The ECJ has for quite a long period been rather reluctant to apply criminal law guarantees to Community sanctions,¹¹⁵ but in its recent case law it affirmed the applicability of the aforementioned principles, as well as the acknowledgment of reasons for justification and exculpation.¹¹⁶

The establishment of Community sanctions is appreciated, because they are governed by one legal order, which is of course Community law, and they are of the same legal nature in all Member States. This is assumed to promote an equal and effective protection of EC law everywhere in the Community.¹¹⁷

4.2.2 Community Sanctions in Competition Law

The most prominent sanction system in the Community was established in the area of competition law. The competition law in the Community is built on two substantive provisions of the EC Treaty: Article 81 EC prohibits agreements, decisions and concerted

¹¹² Schwarze, Jürgen, *supra*, note 82, page 264.

¹¹³ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312, pages 1-4.

¹¹⁴ Ligeti, Katalin, *supra*, note 89, page 204.

¹¹⁵ Tiedemann, Klaus, *supra*, note 30, page 28; see also: Declaration of a Community sanction as not punitive and consequently no application of criminal law guarantees in case “Käserei Champignon” (C-210/00) [2002] ECR I-6453.

¹¹⁶ Tiedemann, Klaus, „Gegenwart und Zukunft des Europäischen Strafrechts“, *Zeitschrift für die gesamte Strafrechtswissenschaft* (2004), No 4, page 947.

¹¹⁷ Winkler, Rolf, „Die Rechtsnatur der Geldbuße im Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft“, 1971, page 16.

practices which may distort competition in the Community and declares any such agreement or decision as automatically void. Article 82 EC prohibits any abuse of a dominant position within the common market. Both provisions imply that the distortion may affect trade between Member States.

Article 83 EC expressly enables the Community to adopt provisions, which shall be designed “to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments.”

In order to achieve the EC Treaty’s aim of a common market,¹¹⁸ it was already in the early years of the Community considered essential to “establish a system ensuring that competition shall not be distorted in the common market.”¹¹⁹ Based on the authority in Article 83 EC (former Article 87), Article 15 of the (by now disestablished) Regulation 17/62¹²⁰ empowered the Commission in case of a breach against Art. 81 or Art. 82 EC, to impose sanctions in the range of 1000 to 1 million Euro¹²¹, or up to 10% of the undertaking’s total turnover. Moreover, it was expressly stated in Article 15 of Regulation 17/62, that sanctions imposed under this article should “not be of a criminal law nature.” The subsequent and presently valid Regulation 1/2003¹²² did not bring any substantive changes to these provisions. In Article 23 of Regulation 1/2003, the range of fines in Regulation 17 for infringements of Articles 81 and 82 EC was adopted, as well as the express legal qualification of sanctions under this article as “not criminal.”

According to this designation of the legal nature of these sanctions, the early case law of the Court insinuated that the sanctions provided for by Article 15 of Regulation 17 did not have a punitive character.¹²³ Correspondingly, the fines imposed in these early years of the Community were rather low.¹²⁴ This practice changed considerably with the Pioneer case¹²⁵

¹¹⁸ Article 2 EC.

¹¹⁹ Preamble of EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 013, Pages 204-211.

¹²⁰ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 013, Pages 204-211.

¹²¹ Of course, the original wording of Article 15 did not say Euro, but „units of account“; later, from 1979 to 1998, the ECU was used as the unit of account in the EC, until it was replaced by the Euro on Jan 1st, 1999.

¹²² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, page 1.

¹²³ E.g. *Boehringer Mannheim GmbH v Commission* (C-45/69) [1970] ECR 769, paras 52 ff.

¹²⁴ Schwarze, Jürgen, *supra*, note 82, page 263.

in 1979, which saw a substantial increase in the level of fines. The Commission imposed what was described as an “exemplary fine” on one of the undertakings involved and the decision was said to “startle the business world.”¹²⁶ The ECJ expressly permitted that the Commission raised the fines for the reason of deterrence.¹²⁷ From that time on, a clear Commission policy to impose high fines to deter serious violations of Articles 81 and 82 has emerged.¹²⁸ A recent decision of the Commission¹²⁹ to fine Microsoft for not complying with an anti-trust decision constitutes a new peak in this development. Microsoft was ordered to pay 899 million Euro, which makes the largest fine the EC has ever imposed on a single company.

In determining the level of the fines, the Commission first has to consider the basic criteria stated by Regulation 1/2003: intent or negligence, and the nature and gravity of the infringement.¹³⁰ In addition, the Commission has developed a system of aggravation and mitigation of fines related to its policy of deterrence through the imposition of fines.¹³¹ It should be mentioned, that the fines are not intended to compensate for the damage done by the infringing party or parties.¹³²

In the light of the case law of the European Court of Human Rights, the amount of the fines imposed by the Commission in competition law procedures and the deterrent purpose of these fines, raise the question to which extent the legal classification of the sanctions as “not criminal” in Article 23 of Regulation 1/2003 can be decisive. This question is widely discussed by legal scholars and commentators in the Community; however this discussion has to date no factual influence on the legal nature of these sanctions. For the purpose of this essay it is therefore sufficient to establish that the fines imposed under the competition law sanctions regime are in fact administrative sanctions.

¹²⁵ Pioneer (C-100-103/80)[1983] ECR 1825.

¹²⁶ Palmer, Fiona, „European Sanctions and Enforcement: European Law Meets the Individual“, *Cambrien Law Review* (1997) No 45, page 49.

¹²⁷ Musique diffusion française (Pioneer) (C-100-103/80) [1983] ECR 1825, para 106.

¹²⁸ Faull, Jonathan, „The Enforcement of Competition Policy in the European Community: A Mature System“, *Fordham International Law Journal* (1991-1992), No 15, page 244.

¹²⁹ Decision of the European Commission C(2008) 764 final of 27 February 2008.

¹³⁰ Regulation 1/2003, Article 23.

¹³¹ Confer: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C210, pages 2-5).

¹³² Faull, Jonathan, *supra*, note 128, page 244.

Another important aspect of the sanctions system in EC competition law is, that it is the model example for the concept of “direct administration” as described above. The Commission acts as the executive authority and is in charge both of the administrative procedure and the imposition of fines. Legal review of its decisions lies with the Court of Justice.¹³³ In the course of establishment, if an infringement of Articles 81 or 82 EC has occurred, the Commission has fairly wide powers of investigation and inspection, such as their famous “dawn raids.”¹³⁴

4.2.3 Community Sanctions in the Field of Agriculture

Since the eighties, regulations of the Community in the field of agriculture contain sanctioning provisions.¹³⁵ The sanctions comprise measures such as the forfeiture of deposits, the withdrawal of a licence, the exclusion from subsidies for the future or surcharges up to 40% on amounts wrongly received and having to be repaid.¹³⁶ By and by, the regulatory activity in this field increased; while the Commission e.g. in 1989 adopted 18 acts providing for sanctions in the field of agriculture, this figure already in 1990 rose to 42 acts.

The introduction of sanctions in this area was regarded as necessary to prevent fraud and other infringements to the detriment of the financial interests of the Community.¹³⁷ The Commission moreover complained about insufficiency of national enforcement measures, and unfounded differences between implementing provisions in the Member States.¹³⁸

Due to the absence of Community provisions stating otherwise, the administrative procedures and imposition of sanctions in this area lie with national authorities in the Member States (see above: indirect administration).

¹³³ Article 31 of Regulation 1/2003 states: “The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.”

¹³⁴ See Article 20 of Regulation 1/2003.

¹³⁵ Heitzer, Anne, *supra*, note 25, page 27.

¹³⁶ Tiedemann, Klaus, *supra*, note 116, page 948.

¹³⁷ Pache, Eckhard, „Zur Sanktionskompetenz der Europäischen Wirtschaftsgemeinschaft“, *Europarecht* (1993) No 2, page 176.

¹³⁸ Palmer, Fiona, *supra*, note 126, page 60.

In the first years after these sanctions were adopted, the Community's competence to actually adopt sanctions in the agricultural sector, as well as their legal basis and the principles applicable to them were unclear and controversial. For some time, the Court only ruled on the legitimacy of such sanctions in individual cases, without making a general statement.¹³⁹ However, in 1992 the Court issued a landmark decision on these questions in the case *Germany v Commission (Sheep Meat)*.¹⁴⁰ The judgment recognizes the "Community's power to impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy."¹⁴¹

When it comes to the legal basis of sanctions in the field of agriculture, there is no provision in the EC Treaty itself providing for such sanctions.

Yet, Article 229 EC (former Art. 172 EC) states: "Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction *with regard to the penalties provided for in such regulations*." This formulation has caused a controversy in legal theory: According to the strict doctrine, it is supposed to refer exclusively to competition law, as the only field, where the possibility to impose sanctions is expressly mentioned in the EC Treaty.¹⁴² In contrast to this opinion, the supporters of a broader interpretation assume that Art. 229 EC implies a general competence to impose sanctions.¹⁴³

However, this discussion has no effect on the legal basis for sanctions in the field of agriculture, since the Court found in *Sheep Meat* that "Article 172 (now Art. 229 EC) concerns only penalties fixed and imposed directly by the Community institutions"¹⁴⁴ and consequently denied applicability of this provision to the agricultural sector.

¹³⁹ Heitzer, Anne, *supra*, note 25, page 136.

¹⁴⁰ *Germany v Commission (C-240/90)* [1992] ECR I-5383.

¹⁴¹ *Ibid.*, at para 11.

¹⁴² Sevenster, Hannah, "Criminal Law and EC Law", *Common Market Law Review* (1992) No 29, page 33.

¹⁴³ They point out, that Art. 229 EC would be redundant, if it only referred to Competition law, see e.g.: Opinion of Advocate General Jacobs in *Germany v Commission (C-240/90)* [1992] ECR I-5383, para 13.

¹⁴⁴ *Germany v Commission (C-240/90)* [1992] ECR I-5383, para 34.

Yet, even in the absence of express provisions in the EC Treaty, the Court's case-law seems to be based on the assumption of a general competence of the Community to impose sanctions, as Advocate General Jacobs showed in his opinion in *Sheep Meat*.¹⁴⁵ The Court consequently found in its judgment in *Sheep Meat*, that the Community has the "power to impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy" and that this power "is based on [the former] Article 40(3) and Article 43(2) EC."¹⁴⁶ (The former) Articles 40(3) and 43(2) EC enabled the Community to adopt "all measures required" for the implementation of a common agricultural policy. By this formulation, the Court made clear that the competence of the Community to provide for sanctions in the agricultural sector comes as an annex to the competences in this field.¹⁴⁷

The Court further, stated that the "sole condition" imposed by Articles 40(3) and 43(2) EC in order for a measure to come within the powers of the Community is, that "the measures contemplated should be necessary to attain the objectives of the common agricultural policy."¹⁴⁸ This formulation leaves a considerable discretion with the Community legislator as to the question, if a measure is necessary for an effective application of the Community rules.

Furthermore, as regards content of the power to impose sanctions, the ECJ did not provide any clear guidelines. The Community legislator was therefore also rewarded a wide discretion regarding the choice of the applicable sanctions. In addition, the Court affirmed

¹⁴⁵ See: Advocate General Jacobs refers in his opinion in *Sheep Meat* to former judgments of the ECJ: *Amsterdam Bulb* (C-50/76)[1977] ECR 137: "in the absence of any provision in the Community rules for the punishment of individuals [...] the national legislatures can adopt such sanctions as appear to them to be appropriate"; *Commission v Greece* (C-68/88)[1989] ECR 2965: "where Community legislation does not specifically provide any penalty for an infringement[...] Article 5 of the Treaty requires the Member States to take all measures necessary".

¹⁴⁶ *Germany v Commission* (C-240/90)[1992] ECR I-5383, para 11.

¹⁴⁷ According to the principle of "effet utile", provisions in the EC Treaty are to be interpreted in a way to give them full effect. If a competence in the EC Treaty is regarded as not enforceable without the imposition of sanctions, the competence to provide for sanctions comes as an annex to the original competence, see: Heitzer, Anne, *supra*, note 25, page 140.

¹⁴⁸ *Germany v Commission* (C-240/90) [1992] ECR I-5383, para 18.

the possibility to adopt sanctions, which are to be imposed by authorities of the Member States.¹⁴⁹

When it comes to the application of criminal law guarantees to sanctions in the agricultural sector, the 1995 Regulation to protect the European Communities financial interests¹⁵⁰ gives some guidance. The preamble of the regulation classifies Community measures in this sector as punitive sanctions, and the regulation stipulates the applicability of general principles, like the principle of legality and the “nulla poena sine culpa”-principle.

¹⁴⁹ Ibid., at paras 20, 32.

¹⁵⁰ See, *supra*, note 113.

4.3 Analogy to the Introduction of Administrative Penalties in the Combat against Ship-Source Pollution

4.3.1 Analogy to Administrative Sanctions in Competition Law

Considering the introduction of administrative penalties in a policy of the Community, it seems to suggest itself to draw on the sanction system in competition law as comparison. This is first of all due to the fact, that the sanction system in competition law is well established and very well known in the Community. The procedures are observed by the public and receive a lot of attention in the media.

Unfortunately, there is one big obstacle to a direct comparison of the sanction system in competition law to other policies in the Community: Competition law is the only field in the EC Treaty where the possibility to impose sanctions is expressly mentioned. Apart from Article 83 EC in competition law, the only article mentioning sanctions in the EC Treaty is Article 229 EC. Irrespective of the question, if Article 229 EC implies a general Community competence to impose sanctions,¹⁵¹ it by now means confers a competence to impose sanctions linked to a special policy like Article 83 EC. Hence, the conferment of the Community competence to impose sanctions in competition law is singular in its form.

However, apart from the legal basis, several features of the sanction system in competition law can be drawn on, thinking about the possibility of administrative sanctions in the combat against ship-source pollution.

As seen above, infringement procedures in Community competition law are characterized by the imposition of high fines. The Court has in its case law on competition matters clearly shown, that the capacity of an administrative penalty to constitute a valid deterrent against infringements justifies the existence of particularly high penalties.¹⁵² Moreover, the deterrent nature of fines imposed in competition matters is increased by the high publicity

¹⁵¹ See above.

¹⁵² Opinion of Advocate General Saggio in *Molkereigenossenschaft Wiedergeltingen v Hauptzollamt Lindau* (C-356/97)[2000] ECR I-5461, para 50.

of such procedures.¹⁵³ Mostly, the accused in such procedures are big undertakings, which can be heavily affected by damage to their “good reputation” in the business world.

There is no reason, why an analogical deterrent effect should not be created in the field of maritime transport through the imposition of high administrative fines. Like in competition matters, it is also in maritime safety mostly corporations that profit from infringements.¹⁵⁴ Therefore, even the range of fines applied in competition matters could give some guidance as to appropriate fines in maritime transport. Moreover, in maritime transport, the systematic use of publicity could even be more effective: Being publicly accused as a “reckless” polluter of the seas probably has an even stronger negative effect on an undertaking’s reputation, than “only” being accused of a breach of competition rules.¹⁵⁵

As explained above, competition law constitutes one of the areas in Community law where the exception of direct administration is applied. The sole competence of Community institutions brings about advantages in the implementation of Community rules. There is no risk that Member States fail to implement Community provisions or that there are differences in enforcement and sanctions actually imposed in the Member States.¹⁵⁶ However, the application of direct administration in the field of maritime safety would bring about a heavy workload for the Commission. Thinking about the fact that the notification system in Competition law was changed in 2004 to reduce the Commission’s workload, the introduction of direct administration in maritime transport does not seem likely.

¹⁵³ Appel, Ivo, *supra*, note 23, page 37.

¹⁵⁴ Faure, Michael and Heine, Günther, *supra*, note 99, page 335.

¹⁵⁵ See in this regard for example statements of Intertanko in connection with the proceedings in *Intertanko v The Secretary of State for Transport* (C-308/06) [2008] ECR 000: “It is important to emphasise that the coalition claimants are not attempting to obstruct the development of the law with respect to combating marine pollution, still less to ensure any kind of ‘freedom to pollute’. They are responsible bodies in a major industry, which are committed to the maintenance of proper standards for the prevention of marine pollution.”, Intertanko Press releases Year 2007, <http://www.intertanko.com/templates/Page.aspx?id=43069> [visited August 14, 2008].

¹⁵⁶ See: Sevenster, Hanna, *supra*, note 142, page 69.

4.3.2 Analogy to Administrative Sanctions in the Field of Agriculture

As seen above, administrative sanctions in the field of agriculture exist in the Community legal order since the eighties, although there is no express legal basis for them in the EC Treaty. However, the Court in its landmark decision in *Sheep Meat* based the Community's competence to provide for sanctions in this field on (the former) Articles 40(3) and 43(2) EC. Articles 40(3) and 43(2) empowered the Community to take actions which "may include all measures required to attain the objectives" of the common agricultural policy.

Measures dealing with maritime safety can be described as having a twofold objective: They aim at the regulation of maritime transport as well as at the protection of the environment. They can therefore be said to be located at an interface between Title V EC, regulating the common transport policy of the Communities, and Title XIX EC on the environment. Therefore, measures in maritime safety could theoretically have their legal basis in both Community policies.

Concerning the combat against ship-source pollution, Directive 2005/35/EC "on ship-source pollution and on the introduction of sanctions, including criminal sanctions for polluting offences", was based on the Community policy in transport, more precisely on Article 80(2) EC. Also the Proposal for an amending Directive 2005/35/EC¹⁵⁷ is based on Art. 80(2) EC. The Commission explains this choice of a legal basis by simply stating that "The provisions of this Directive relate to maritime transport. Consequently, the legal base chosen is Article 80(2) of the EC Treaty."¹⁵⁸ However, the Preamble of Directive 2005/35/EC starts with the words: "The Community's maritime safety policy is aimed at a high level of safety and environmental protection[...]."¹⁵⁹ This formulation shows, that the Directive first of all aims at the protection of the environment. Advocate General Mazak pointed out in this regard, that "the fact that a Community measure pursues aims of

¹⁵⁷ COM(2008) 134 final.

¹⁵⁸ Ibid.

¹⁵⁹ OJ 2005 L 255, page 11.

environmental protection does not automatically mean that it has to be adopted on the basis of Art.175 EC.”¹⁶⁰ In reverse, it could in theory also have been based on Art. 175 EC.

It therefore makes sense to take a closer look at the enabling norms in both fields: The enabling norm concerning maritime transport is Article 80(2) EC, which reads: “The Council may,[...], decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.”

In environmental matters, the relevant norm is Art. 175 EC, which states: ”The Council, [...] shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.“

Both provisions give a wide discretion to the Council in deciding, which measures should be adopted to achieve the aims of the Treaty. There is no instruction as to the content of the measures that should be adopted. The Council is therefore only limited by the general principles of Community law, like e.g. the subsidiarity and proportionality principle. The structure of these norms corresponds to (the former) Art. 40(3) and 43 (2) EC, on which the Court based the Community`s sanctioning competence in the agricultural sector as an annex to the competences in this field. Based on the wording of Articles 80(2) and 175 EC and the “effet utile” principle, there appears to be no reason, why the Court`s reasoning in the agricultural sector should not be conferrable to the Community policies of transport and environment.

Another aspect of Community sanctions in the agricultural sector is their diversity. As set out above, the Community regulations in this field provide for quite a wide variety of different penalties. Also concerning environmental infringements, sanctions other than fines or imprisonment seem to be effective. At least, various Member States of the Community increasingly make use of so-called complementary sanctions in environmental matters.¹⁶¹ These measures contain e.g. the restoration of harm done to the environment, the removal of illegal gains, the “black-listing” of offenders or the future refusal of a

¹⁶⁰ AG Mazak, *supra*, note 12, para 128.

¹⁶¹ Faure, Micheal and Heine, Günther, *supra*, note 99, page 334.

licence.¹⁶² As these complementary sanctions seem to prove effective both on Member State and Community level, it seems advisable to also introduce them on a Community level in order to protect the environment. At least, the enabling norms in the Community policies of transport and environment do not prevent this, as there are no limitations as to the content of measures adopted under these norms.

Community sanctions in the agricultural sector are imposed by national authorities in the Member States. Also in environmental matters, many norms were adopted on Community level, but enforcement mechanisms were traditionally left with the Member States.¹⁶³ Considering the expertise of national administrative authorities and the workload which the Commission would have to handle in case of a change to the system, indirect administration seems most appropriate for sanctions in the fields of transport and environment.

4.4 Discussion of the Introduction of Administrative Sanctions in the Field of Maritime Safety Instead of Criminal Sanctions

4.4.1 The Question of Effectiveness

In the proposal for an amending Directive 2005/35/EC, the Commission states that criminal law related measures “are necessary to ensure that the Community’s rules on maritime safety will be fully effective.”¹⁶⁴ To justify this assumption, the Commission gives the following reasoning:

“[...] the deterrent effect of the [present] system of sanctions must be reinforced, sending a strong signal, with a much greater dissuasive effect, to potential offenders. Common rules on criminal offences make it possible to use effective methods of judicial cooperation between Member States. Criminal investigation and prosecution can be more powerful than administrative action.”¹⁶⁵

¹⁶² Ibid.

¹⁶³ Faure, Michael, “European Environmental Criminal Law: Do we really need it?”, *European Environmental Law Review* (2004), page 20.

¹⁶⁴ COM (2008) 134 final.

¹⁶⁵ EUROPA Press Releases, *supra*, note 9.

This reasoning largely corresponds to former statements of the Commission, as e.g. given in a proposal for a directive “on the Protection of the Environment through Criminal Law”¹⁶⁶ presented by the Commission on 13 March 2001. The Commission held:

In many cases, only criminal penalties will provide a sufficiently dissuasive effect. First, the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law. It sends a strong signal, with a much greater dissuasive effect, to offenders. [...] Second, the means of criminal prosecution and investigation (and assistance between Member States) are more powerful than tools of administrative or civil law and can enhance effectiveness of investigations. Furthermore, there is an additional guarantee of impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation.

In both statements, the Commission basically gives two arguments justifying the introduction of criminal penalties.

First, it attributes “a much greater dissuasive effect” to criminal sanctions than to other types of sanctions. While this “greater dissuasive effect” is not explained any further in the present proposal, the 2001 proposal at least points to “a social disapproval of a qualitatively different nature compared to administrative sanctions.” It is of course true, that the “ethical dimension”¹⁶⁷ of criminal law distinguishes criminal sanctions from other types of sanctions. However, it seems doubtful if this can be enough to make criminal law per se effective. At least, this “symbolic” character of criminal law can not serve as an objective criterion on which the principle of effectiveness can be based.¹⁶⁸

Besides, the dissuasive effect which is created by the high publicity and high fines in competition law procedures should not be overlooked. In light of fines and public attention as in the recent Microsoft case¹⁶⁹, it is doubtful whether the mere fact that a sanction is criminal really creates such a “greater dissuasive effect.”

¹⁶⁶ COM (2001) 139 final.

¹⁶⁷ AG Colomer, *supra*, note 20, para 74.

¹⁶⁸ Herlin-Karnell, Esther, “Commission v Council: Some reflections on Criminal Law in the First Pillar”, *European Public Law* (2007) No 13, page 77.

¹⁶⁹ Decision of the European Commission C(2008) 764 final of 27 February 2008.

The second argument of the Commission for the introduction of criminal penalties, is that it considers criminal investigation and prosecution to be more powerful than administrative action. In addition, it considers criminal procedures as a guarantee for impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation. Regarding the latter, the Commission ignores the fact, that in most Member States not the administrative authorities granting a licence or giving an authorisation will be involved in subsequent investigation procedures, but different authorities.¹⁷⁰ As to the assumption, that criminal investigation is per se more powerful than administrative action it should be noted, that environmental law enforcement requires a great deal of expertise. In this area, administrative authorities often have more technical knowledge and information than traditional law enforcement authorities.¹⁷¹ So, in addition to the limited capacity of police forces in most Member States, they mostly also lack this expertise. Moreover, the introduction of criminal sanctions in implementing legislation does not guarantee the effective application of these sanctions in question. In most Member States, the so-called opportunity principle is still valid and there is no duty to actually prosecute.¹⁷²

Furthermore, administrative sanctions can be more differentiated than criminal penalties - the widespread use of complementary sanctions in the Member States is a sign, that these sanctions are suitable in the protection of the environment. The introduction of criminal penalties could therefore deprive legal systems of their flexibility in environmental matters.

4.4.2 Culpability of Legal Persons

Against the background of the Commission's view that criminal law is a "necessary instrument in the fight for an effective enforcement of the rules on maritime safety", the status of legal persons becomes quite an interesting question. The proposal for an amending

¹⁷⁰ Faure, Michael, *supra*, note 163, page 22.

¹⁷¹ Ibid.

¹⁷² Ibid.

Directive 2005/35/EC¹⁷³ stipulates that offences under the Directive should be punishable by “effective proportionate and dissuasive penalties, which have to be of a criminal nature for legal persons. Effective, proportionate and dissuasive penalties should also be applied to legal persons if they are considered liable [...]”. However, the proposed Directive “leaves the Member States the choice of whether criminal penalties should also apply to legal persons.” This is due to the fact, that not all Member States know the concept of corporate criminal liability.¹⁷⁴ In order to prevent, that these States have to make changes in their national criminal law systems, the Directive leaves the criminal liability of legal persons to the Member States.¹⁷⁵

There is a remarkable repugnance in the Commission`s reasoning when it comes to the role of legal persons in the area of maritime safety. On one side, the Commission states that “only criminal penalties will provide a sufficiently dissuasive effect.”¹⁷⁶ On the other side, it considers non-criminal sanctions for legal persons sufficient, as long as they are effective, proportionate and dissuasive.¹⁷⁷

This shows that the Commission at least recognizes the possibility of effective non-criminal sanctions in maritime safety, even if it would prefer criminal sanctions. Most environmental crimes are committed by natural persons for the benefit of corporations.¹⁷⁸ The shipping industry is of course no exception to this. It is therefore obvious, that if sanction rules in maritime safety are supposed to be effective, one must put emphasis on the role of legal persons.

Unfortunately, the Commission with its focus on criminal law ignores the possibility to create by itself an effective sanction system for legal persons in maritime safety. In the current situation it is left with the Member States, if they want to sanction legal persons by criminal or non-criminal sanctions. Moreover, if they choose to apply non-criminal

¹⁷³ COM (2008) 134 final.

¹⁷⁴ See above under 4.1.

¹⁷⁵ Confer the reasoning in COM (2001) 139 final.

¹⁷⁶ Ibid.

¹⁷⁷ Faure, Michael, *supra*, note 163, page 23.

¹⁷⁸ Faure, Michael and Heine Günther, *supra*, note 99, page 335.

sanctions, they are completely free regarding the type and level of these sanctions. This can leave to considerably differences in the sanctioning of legal persons for infringements under the Directive 2005/35/EC. There is no guarantee at all, that no “safe heavens” for legal persons committing offences under the Directive will be provided. If the Community instead introduced the same administrative measures or a certain level of fines for infringements in all Member States, it would send a much stronger signal to legal persons involved in the shipping industry.

4.4.3 The International Character of the Shipping Industry – Distortion of Competition

As seen above, the competition rules of the Community aim at avoiding distortion of competition as much as possible in order to create a common market. The rationale is, that if equal conditions of competition are achieved in the Member States, the market will do the rest to establish the common market.¹⁷⁹ Disparities in sanction levels constitute an objective difference in the conditions of competition between Member States. However, regarding sanction rules, it is very unlikely that the free play of market forces will lead to desirable results. As Member States normally do not want to place their own companies at disadvantage, they rather prefer to be too lenient than being too strict.¹⁸⁰

The shipping industry is like no other industry characterised by its cross-border dimension. Different conditions regarding the shipping industry's activities in the Member States are therefore very likely to have an immediate impact on competition. Especially in such an international industry, uneven enforcement of Community rules can easily lead to tensions and erosion of public confidence in the system.¹⁸¹ Moreover, Member States could consciously keep their sanction levels low to profit from the so-called “Delaware Effect.” The “Delaware effect” describes a situation in which sanction levels in different states vary

¹⁷⁹ Sevenster, Hannah, *supra*, note 142, page 54.

¹⁸⁰ *Ibid.*

¹⁸¹ Palmer, Fiona, *supra*, note 126, page 66.

to such an extent, that it influences the decision of companies where to establish business or whether to transfer certain activities to another State.¹⁸² By the adoption of a Community legal act providing for the same administrative sanctions throughout the Community, distortion of competition could be avoided.

4.4.4 Choice of Instruments

The proposal for an amending Directive 2005/35/EC states that the existing Directive 2005/35/EC must be brought in line with the Court ruling in Case C-440/05 (*the Marine Pollution case*).¹⁸³ According to the proposal, a directive can only be amended by an amending directive.

Independent from this rule regarding amendments, there is no reason why a directive should not be supplemented by a regulation. Articles 80(2) and 175 EC enable the Community to adopt regulations both in the field of maritime transport and environment. Even if environmental law in the Community has traditionally been in the form of Directives, there is no rule restricting Community environmental law to one legal instrument only. In theory, both a directive and a regulation providing for administrative sanctions in the field of maritime safety could be based on either Art. 80(2) or Art. 175 EC.

¹⁸² Ibid.

¹⁸³ COM (2008) 134 final.

5 Conclusion

By adopting Directive 2005/35/EC and Framework Decision 2005/667/JHA, the Community first and foremost aimed at the protection of the seas against pollution by irresponsible actors of the shipping industry. Moreover, the Community aimed at implementing the International Convention for the Prevention of Pollution from Ships (MARPOL), which stipulates in Article 4(4) that penalties have to be “adequate in severity to discourage” potential polluters.

The Community decided that criminal penalties constitute a necessary tool to ensure an effective enforcement of the rules on maritime safety. The annulment of Framework Decision 2005/667/JHA tore a hole in the European legislative package designed to achieve an equal protection of the marine environment all over the Community.

Concerning the question whether the judgment in *Marine Pollution* rather weakened or strengthened the fight against pollution of the seas, no definite answer can be provided at this point of time. On one hand, the Community was awarded the authority to instruct the Member States to introduce criminal penalties for polluting acts, which means that it can also enforce this instruction with its full powers under the supranational first pillar. On the other hand, it is by no means granted that the Community will reach the qualified majority in the Council to adopt such a legislative act. And even more important, the judgment led to a loss of the provisions providing for an approximation of sanction levels for polluting acts in the Member States.

In the course of its efforts to fill this “legal vacuum created concerning a harmonised approach regarding possible penalties in the fight against maritime pollution”¹⁸⁴ the Commission decided in favour of a partial solution: It adopted a proposal for an amending

¹⁸⁴ Proposal for amending Directive 2005/35/EC, *supra*, note 63.

Directive 2005/35/EC based on Article 80(2) EC, which contains an obligation of the Member States to regard infringements under the Directive as criminal offences. However, the types and levels of penalties to be adopted in order to sanction these offences are left with the Member States.

This approach is logical from the Commission's viewpoint. As it is determined to stick with the criminal law in order to combat pollution, it fully utilises the Community's competences in this sphere as set out by the Court in *Marine Pollution*. And since the Court ruled, that the Community is not competent to decide on type and level of criminal sanctions, the Commission intends to leave the decision on sanctions with the Member States.

Moreover, the requirement to sanction infringements under Directive 2005/35/EC by criminal penalties does not include legal persons. So, regarding the most important actors in the shipping industry there are no clear instructions at all regarding sanctions, apart from the rather abstract stipulation that they be "effective, proportionate and dissuasive." Considering the different attitudes of the Member States on maritime safety rules, it is very likely that sanction levels, and concerning legal persons even the legal nature of sanctions, will differ considerably in the Community. Like this, the Community's aim of prevention of "safe heavens" for offenders can not be guaranteed, and due to the international character of the shipping industry, differences in sanction levels are very likely to distort competition.

However, the Court's ruling, that the Community must not decide on type and level of sanctions only refers to criminal sanctions. When it comes to administrative sanctions on the contrary, the Community is free to regulate on both of these aspects.

Administrative penalties have proved to be an effective means of enforcement of Community law, especially in the field of competition law and in the agricultural sector. By the imposition of high fines and the use of publicity, administrative sanctions in competition law have reached a strong deterrent effect. Community sanctions in the agricultural sector stand out by a broad diversity of sanctions, which allows an appropriate answer to the respective breach of Community law. As could be seen, many of the features

of these sanction systems could be transferred to the field of maritime safety. The Community could utilise its experience with administrative penalties in competition law and the agricultural sector to promote the enforcement of Community rules on maritime safety.

It may be true, that criminal law generally constitutes the fiercest means of legal systems to prevent certain forms of behaviour. However, this does not mean, that criminal law has to be the most effective means in any situation. Concerning ship-source pollution, a consistent system of administrative sanctions at Community level would certainly send a much stronger signal to potential offenders. All actors in the shipping industry would know that polluting offences result in the same consequences all over the Community. In addition, no Member State would be able to make itself more attractive to the shipping industry by applying more lenient rules than others.

If the Community really wants to ensure that penalties are “adequate in severity to discourage” potential polluters as stipulated by MARPOL, it should abandon its approach, that only criminal law can be truly effective to prevent ship-source pollution. It should rather adopt a legislative act providing for administrative sanctions on Community level, entailing penalties of sufficient severity to have a deterrent effect on the shipping industry.

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